RESPONSE OF THE UNITED STATES OF AMERICA
DATED OCTOBER 21, 2005
TO INQUIRY OF THE UNCHR SPECIAL RAPPORTEURS DATED AUGUST 8, 2005
PERTAINING TO DETAINEES AT GUANTANAMO BAY

Note: Text in brackets indicates updates to information contained in the original submissions.

1. Legal Framework for Detention (questions numbered 3,4,7)

Q3. Please set forth the legal basis for the detention of the persons held at Guantanamo Bay. In this context, please elaborate on the applicability of international humanitarian law and/or of international human rights law to their detention.

Q4. How soon after their arrest have the detainees been given access to a lawyer?

Q7. Have the detainees been promptly informed of the reasons for their arrest and detention and the charges brought against them? In what form and language?

As the United States stated in its Annex to the Second Periodic Report of the United States to the Committee Against Torture, Part One [Annex to CAT report], filed on May 6, 2005, pg. 7-8, and in its response to a UN CHR 1503 procedure, dated January 2005, pages 3-4:

Law of War. It is important to recall the context of the Guantanamo detentions. The war against al-Qaida and its affiliates is a real (not a rhetorical) war, and the United States must fight it that way. On September 11, 2001, the United States was the victim of massive and brutal terrorist attacks carried out by 19 al-Qaida suicide attackers who hijacked and crashed four U.S. commercial jets with passengers on board, two into the World Trade Center towers in New York City, one into the Pentagon near Washington, D.C., and a fourth into a field in Shanksville, Pennsylvania, leaving approximately 3000 innocent individuals dead or missing.

The United Nations Security Council condemned the terrorist attacks of September 11, 2001 as a "threat to international peace and security" and recognized the "inherent right of individual and collective self-defence in accordance with the Charter." See U.N. Security Council Resolution 1368, U.N. Doc. No. S/RES/1368 (September 12, 2001); see also U.N. Security Council Resolution 1373, U.N. Doc. No. S/RES/1373 (September 28, 2002). The North Atlantic Treaty Organization (NATO), the Organization of

American States (OAS) under the 1947 Inter-American Treaty of Reciprocal Assistance (Rio Treaty), and Australia under the ANZUS Treaty, similarly considered the terrorist attacks on the United States as an armed attack, justifying action in self-defense. See Statement of Australian Prime Minister on September 14, 2001 (Article IV of ANZUS applies to the 9/11 attacks); Statement of October 2, 2001 by NATO Secretary General Lord Robertson (9/11 attacks regarded as an action covered by Article 5 of the Washington treaty); OAS publication, United Against Terrorism, www.oas.org/assembly/GAAssembly200Q/Gaterrorism.htm.

On October 7, 2001, President Bush invoked the United States' inherent right of self-defense and, as Commander in Chief of the U.S. Armed Forces, ordered the U.S. Armed Forces to initiate action in self-defense against the terrorists and the Taliban regime that harbored them in Afghanistan. The United States was joined in the operation by the United Kingdom and coalition forces, comprising (as of December 2003) 5,935 international military personnel from 32 countries.

It is clear from the foregoing that the U.S. Government, and indeed the international community, have concluded that al-Qaida and related terrorist networks are in a state of armed conflict with the United States. al-Qaida attacks have deliberately targeted civilians and protected sites and objects (see the United States submission in this case dated December 24, 2003, at pages 5-6, for a detailed discussion of al-Qaida attacks and operations), and the fight is ongoing. Recent examples include the bombing on November 8, 2003, of a Riyadh housing compound, and the bombings in Istanbul in 2003 that killed the British Consul.

The law of war applies to the conduct of war (and the United States for purposes of brevity will not elaborate in detail its long-standing position that the International Covenant on Civil and Political Rights applies to "individuals within its territory **and** subject to its jurisdiction", ICCPR Article 2(1). Emphasis added.) The law of war allows the United States - and any other country engaged in combat — to hold enemy combatants without charges or access to counsel for the duration of hostilities. Detention is not an act of punishment but of security and military necessity. It serves the purpose of preventing combatants from continuing to take up arms against the United States. These are the long-standing, applicable rules of the law of war, a fact recognized by the U.S. Supreme Court in its recent decisions.

Indeed, the Inter-American Commission on Human Rights recently recognized that international humanitarian law (the law of war) is the *lex specialis* that may govern the issues surrounding Guantanamo detention. As the Inter-American Commission stated:

> "In certain circumstances, however, the test for evaluating the observance of a particular right, such as the right to liberty, in a situation of armed conflict may be distinct from that applicable in time of peace. In such situations, international law, including the jurisprudence of the Commission, dictates that it may be necessary to deduce the applicable standard by reference to international humanitarian law as the applicable *lex specialis*."

Inter-American Commission on Human Rights Request to the United States for Precautionary Measures, in Detainees in Guantanamo Bay, Cuba, dated March 12, 2002, at page 3.

On February 7, 2002, shortly after the United States began operations in Afghanistan, President Bush's Press Secretary announced the President's determination that the Geneva Convention "appl[ies] to the Taliban detainees, but not to the al-Qaida international terrorists" because Afghanistan is a party to the Geneva Convention, but al-Qaida — an international terrorist group — is not. Statement by the U.S. Press Secretary, The James S. Brady Briefing Room, in Washington, D.C. (Feb. 7, 2002) (at <http://www.state.gov/s/l/38727.htm>(visited March 1, 2005)). Although the President determined that the Geneva Convention applies to Taliban detainees, he determined that, under Article 4, such detainees are not entitled to POW status. Id. He explained that:

> Under Article 4 of the Geneva Convention, . . . Taliban detainees are not entitled to POW status . . . .
>
> The Taliban have not effectively distinguished themselves from the civilian population of Afghanistan. Moreover, they have not conducted their operations in accordance with the laws and customs of war. . . .
>
> al-Qaida is an international terrorist group and cannot be considered a state party to the Geneva Convention. Its

members, therefore, are not covered by the Geneva Convention, and are not entitled to POW status under the treaty.

Statement by the U.S. Press Secretary, The James S. Brady Briefing Room, in Washington, D.C. (Feb. 7, 2002) (at <http://www.state.gov/s/l/38727.htm> (visited March 1, 2005)); see also, White House Memorandum - Humane Treatment of al-Qaida and Taliban Detainees, February 7, 2002, at 2(c) & (d) (released and declassified in full on June 17, 2004). (At <http://www.washingtonpost.com/wp-srv/nation/documents/020702bush.pdf> (visited March 1, 2005)).

After the President's decision, the United States concluded that those who are part of al-Qaida, the Taliban or their affiliates and supporters, or support such forces are enemy combatants whom we may detain for the duration of hostilities; these unprivileged combatants do not enjoy the privileges of POWs (i.e., privileged combatants) under the Third Geneva Convention.[1] International law, including the Geneva Conventions, has long recognized a nation's authority to detain unlawful enemy combatants without benefit of POW status.[2] See, e.g., INGRID DETTER, THE LAW OF WAR 148 (2000) ("Unlawful combatants . . . though they are a legitimate target for any belligerent action, are not, if captured, entitled to any prisoner of war status."); see also United States v. Lindh, 212 F. Supp. 2d. 541, 558 (E.D. Va. 2002) (confirming the Executive branch view that "the Taliban falls far short when measured against the four GPW criteria for determining entitlement to lawful combatant immunity.")

Because there is no doubt under international law as to the status of al-Qaida, the Taliban, their affiliates and supporters, there is no need or

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[1] *See, e.g.*, Secretary Rumsfeld's statement that the detainees "are not POWs" and instead are "unlawful combatants." Gerry J. Gilmore, *Rumsfeld Visits, Thanks U.S. Troops at Camp X-Ray in Cuba*, American Forces Press Service, Jan. 27, 2002. (At <http://www.defenselink.mil/news/Jan2002/n01272002_200201271.html> (visited April 11, 2002)).

[2] The U.S. Supreme Court, citing numerous authoritative international sources, has held that unlawful combatants "are subject to capture and detention, [as well as] trial and punishment by military tribunals for acts which render their belligerency unlawful." *See Exparte Quirin*, 317 U.S. 1, 31 (1942) (citing GREAT BRITAIN, WAR OFFICE, MANUAL OF MILITARY, ch. xiv, §§ 445-451; REGOLAMENTO DI SERVIZIO IN GUERRA, § 133, 3 LEGGI E DECRETI DEL REGNO D'ITALIA (1896) 3184; 7 MOORE, DIGEST OF INTERNATIONAL LAW, § 1109; 2 HYDE, INTERNATIONAL LAW, §§ 654, 652; 2 HALLECK, INTERNATIONAL LAW (4th Ed. 1908) § 4; 2 OPPENHEIM, INTERNATIONAL LAW, § 254; HALL, INTERNATIONAL LAW, §§ 127, 135; BATY & MORGAN, WAR, ITS CONDUCT AND LEGAL RESULTS (1915) 172; BLUNTSCHI, DROIT INTERNATIONAL, §§ 570 bis).

requirement to review individually whether each enemy combatant detained at Guantanamo is entitled to POW status. For example, Article 5 of the Third Geneva Convention requires a tribunal in certain cases to determine whether a belligerent (or combatant) is entitled to POW status under the Convention only when there is doubt under any of the categories enumerated in Article 4.[3] The United States concluded that Article 5 tribunals were unnecessary because there is no doubt as to the status of these individuals.

After the decisions of the U.S. Supreme Court in Rasul v. Bush, 124 S.Ct. 2686 (2004), and Hamdi v. Rumsfeld, 124 S.Ct. 2633 (2004), which are described below, the U.S. Government established a process on July 7, 2004, to conduct Combatant Status Review Tribunals (CSRTs) at Guantanamo Bay. (At <www.defenselink.mil/transcripts/2004/tr200440707-0981.html> (visited March 1, 2005) (Department of Defense Briefing on Combatant Status Review Tribunal, dated July 7, 2004)). Consistent with the Supreme Court decision in Rasul, these tribunals supplement the prior screening procedures and serve as fora for detainees to contest their designation as enemy combatants and thereby the legal basis for their detention. The tribunals were established in response to the Supreme Court decision in Rasul and draw upon guidance contained in the U.S. Supreme Court decision in Hamdi that would apply to citizen-enemy combatants in the United States.

See section 3 below for additional detailed discussion of judicial and administrative proceedings in the United States and at Guantanamo related to detainees.

2. Conditions of Detention

a. General (# 1,2,8,10, 12)

Q1. Please provide a list of all persons currently detained by the United States in facilities located at Guantanamo Bay, Cuba. Please

[3] Article 5 states:
"Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the *protection* of the present Convention *until* such time as their status has been determined by a competent tribunal." [emphasis added]. Geneva Convention Relative to the Treatment of Prisoners of War, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135, Signed at Geneva on Aug. 12, 1949; entered into force on Oct. 21, 1950 (entered into force for the United States, Feb. 2, 1956).

indicate their names, nationalities, date and place of arrest, and date of transfer to Guantanamo.

Q2. Please provide a list of all persons who were previously detained in facilities located at Guantanamo Bay and who have been released. Please indicate their names, nationalities, date and place of arrest, dates of detention at Guantanamo, dates of release and to which country and/or under whose authority they have been released.

Q8. Have the families been notified of the detention and location of their relatives and the charges against them?

Q10. Have their embassies/consulates been notified? If so, were representatives of the diplomatic missions able to meet with their respective nationals?

Q12. Please describe the condition of detention in these places including information about incommunicado detention, periods of solitary confinement, periods of leisure activities, access to medical examinations and treatment, size of cells, etc.]

As the United States stated in its Annex to the CAT Report, pp. 5, 11-12, and 17 (updated as indicated in brackets), and in its response to a UN CHR 1503 procedure, dated January 2005, pages 41-42:

The first group of enemy combatants captured in the war against al-Qaida, the Taliban, and their affiliates and supporters arrived in Guantanamo Bay, Cuba, in January 2002. The United States has approximately 520 detainees in custody at Guantanamo (at http://www.defenselink.mil/releases/2005/nr20050419-2661.html (visited April 28, 2005)) and slightly more than 500 detainees in Afghanistan. These numbers represent a small percentage of the total number of individuals the United States has detained, at one point or another, in fighting the war against al-Qaida and the Taliban.

(DoD Annex to CAT report p. 5)

As of [September 26, 2005], the United States has transferred [264] persons from Guantanamo — [178] transferred for release and [68] transferred to the custody of other governments for further detention, investigation, prosecution, or control. Of the [68] detainees who were

transferred to the control of other governments, 29 were transferred to Pakistan, seven to Russia, five to Morocco, nine to the United Kingdom, six to France, four to Saudi Arabia, two to Belgium, one to Kuwait, [two] to Spain, one to Australia, [one to Denmark] and one to Sweden.

In some situations, it has been difficult to find locations to which to transfer safely detainees from Guantanamo when they do not want to return to their country of nationality or when they have expressed reasonable fears if returned. Until the United States can find a suitable location for the safe release of a detainee, the detainee remains in U.S. control.
(DoD Annex p. 11-12)

> Detainees write to and receive mail from their families and friends. Detainees who are illiterate, but trustworthy enough for a classroom setting, are taught to read and write in their native language so they, too, can communicate with their families and friends.
> (DoD Annex to CAT report, p. 17)

Detainees are also permitted to receive and send mail to family and friends at home via petitions and postcards. They use either the U.S. military postal service, or the ICRC, which delivers mail via its offices in each country. The volume of communications is substantial and numbers well over 6,000 since detainees began arriving at Guantanamo in January 2002.
(1503 p.41)

Some have met with government officials from their country of nationality. It is noted, however, that there is no requirement under international law for enemy combatants detained under the law of war to be permitted to meet with family members or consular representatives.

(1503 p. 42)

b. <u>Humane Treatment/Interrogations (#9, 14, 26, 27, 29)</u>

Q9. Do the detainees have the assistance of interpreters?

Q14. Please indicate names of private firms authorized to manage places of detention and conduct interrogations?

Q26. Please share with us all relevant internal instructions and other internal legal acts relating to methods of interrogation and to the treatment of detainees as used in places of detention where terror suspects are held.

Q27. Please describe the methods of interrogation routinely used vis-a-vis terror suspects including their treatment concerning shaving, clothing, etc.

Q29. What compensation have the victims of torture or their familiesreceived?

As the United States stated in its response to a UN CHR 1503procedure, dated January 2005, pages identified below:

At the outset, and before addressing specifically issues related to detention at Guantanamo, we underscore that it is the policy of the United States to treat all detainees and conduct all interrogations, wherever they may occur, in a manner consistent with the commitments made by the United States, in ratifying the Convention Against Torture, to prevent torture and other cruel, inhuman or degrading treatment or punishment. (1503 p. 1)

The Department of Defense is committed to treating all detainees it holds at Guantanamo humanely. To the extent that an August 1, 2002 Department of Justice memorandum could be construed as potentially permitting abuse of detainees, we take this opportunity to confirm that the memorandum was not so intended and has been withdrawn. It was withdrawn in June 2004, and a Department of Justice Memorandum dated December 30, 2004, http://www.usdoj.gov/olc/dagmemo.pdf (hereinafter 2004 Justice Department Memorandum), "supersedes the August 2002 Memorandum in its entirety." 2004 Justice Department Memorandum at page 2.

The 2004 Justice Department Memorandum restates "the President's unequivocal directive that United States personnel not engage in torture." Id. As quoted below, the President has made clear that the United States stands against and will not tolerate torture and that the United States remains committed to complying with its obligations under the Convention Against

Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

The 2004 Justice Department memorandum further reaffirms that:

> "Torture is abhorrent both to American law and values and to international norms. This universal repudiation of torture is reflected in our criminal law, for example, 18 U.S.C. 2340-2340A; international agreements, exemplified by the United Nations Convention Against Torture (the "CAT"); customary international law; centuries of Anglo-American law; and the longstanding policy of the United States, repeatedly and recently reaffirmed by the President."
>
> Id. at page 1.

The federal torture statute, 18 U.S.C. 2340A, provides that "[w]hoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life." Section 2340(1) defines torture as "an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control."

As the 2004 Justice Department Memorandum explains:

> "Congress enacted sections 2340-2340A to carry out the United States' obligations under the CAT. *See* H.R. Conf. Rep. No. 103-482, at 229 (1994). The CAT, among other things, obligates state parties to take effective measures to prevent acts of torture in any territory under their jurisdiction, and requires the United States, as a state party, to ensure that acts of torture, along with attempts and complicity to commit such acts, are crimes under U.S. law. *See* CAT arts. 2, 4-5. Sections 2340-2340A satisfy that requirement with respect to acts committed outside the United States." (Page 4, footnotes omitted).

The United States is aware of previous allegations of mistreatment of detainees at Guantanamo as reflected in recently released Federal Bureau of Investigation documents and concerns about treatment reportedly expressed by officials of the International Committee of the Red Cross. The United States deeply regrets any instances of abuse of detainees anywhere. Allegations of abuse are investigated by appropriate U.S. officials, and steps are taken to hold accountable persons found responsible for such acts. Independent investigations documented eight instances of infractions at Guantanamo. Each of the eight credible allegations of mistreatment or abuse was thoroughly investigated, and the military command acted quickly and appropriately to the actions of those involved in wrongdoing. Punishments ranged from admonishment to court-martial.

The Department of Defense denies any allegations of torture at Guantanamo. As recently as December 8, 2004, the Defense Department reaffirmed that it does not tolerate or condone torture under any circumstances. Whenever a credible allegation is raised to the attention of authorities, the Department of Defense makes every effort to investigate it fully. A spokesperson for Brigadier General Jay Hood, the commander of the detention and interrogation operation at Guantanamo, reaffirmed on December 6 that "[w]e investigate any such allegations and take appropriate action." The Department of Defense is investigating allegations contained in documents recently released under the Freedom of Information Act, including those released by the Federal Bureau of Investigation, to ensure that the Department of Defense has considered any credible allegations contained in those documents.

It remains the policy of the United States to comply with all of its legal obligations in the treatment of detainees and, in particular, with legal obligations prohibiting torture. Indeed, on United Nations International Day in Support of Victims of Torture, June 26, 2004, the President stated that:

> "The United States reaffirms its commitment to the worldwide elimination of torture. . . . To help fulfill this commitment, the United States has joined 135 other nations in ratifying the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. America stands against and will not tolerate torture. We will investigate and prosecute all acts of torture and undertake to prevent other

cruel and unusual punishment in all territory under our jurisdiction."

"These times of increasing terror challenge the world. Terror organizations challenge our comfort and our principles. The United States will continue to take seriously the need to question terrorists who have information that can save lives. But we will not compromise the rule of law or the values and principles that make us strong. Torture is wrong no matter where it occurs, and the United States will continue to lead the fight to eliminate it everywhere."

On June 22, 2004, upon the authorized release of numerous government documents related to U.S. laws regarding torture and to interrogation techniques, Counsel to the President Alberto Gonzales stated the following:

"The administration has made clear before, and I will reemphasize today that the President has not authorized, ordered or directed in any way any activity that would transgress the standards of the torture conventions or the torture statute, or other applicable laws. …[L]et me say that the U.S. will treat people in our custody in accordance with all U.S. obligations including federal statutes, the U.S. Constitution and our treaty obligations. The President has said we do not condone or commit torture. Anyone engaged in conduct that constitutes torture will be held accountable." White House Press Release of June 22, 2004.

In a White House memorandum of February 7, 2002 (released on June 22, 2004), the President stated United States policy as follows:

"Of course our values as a Nation, values that we share with many nations in the world, call for us to treat detainees humanely, including those who are not legally entitled to such treatment [under the Geneva Conventions]. . . . As a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva…."

To prevent instances of misconduct, it is U.S. policy that military personnel are trained, disciplined, and informed on the laws and customs of armed conflict. United States forces are subject to the Uniform Code of Military Justice, which provides for penalties for many military offenses that are more severe if committed during an armed conflict. A Department of Defense Directive requires that incidents involving violations of the law of war committed by U.S. persons be promptly reported, thoroughly investigated, and when factually substantiated, remedied by corrective action. Guantanamo personnel are trained on this requirement and are regularly briefed on their responsibility to report mistreatment.

Further, regarding training procedures, personnel assigned to Guantanamo go through an extensive professional and sensitivity training process to ensure they understand the procedures for protecting the rights and dignity of detainees at Guantanamo:

- Personnel mobilizing for duty at Guantanamo receive training prior to deployment on detention facility operations, self-defense, safety, and rules on the use of force. Before beginning work at the facility, personnel again receive training on the Law of Armed Conflict, the rules of engagement, the standard operating procedures, and military justice.

- During their tour they continue to receive briefings, and before every detainee movement they are briefed again on the rules of engagement and rules on the use of force.

The facility at Guantanamo is continually open to members of the International Committee of the Red Cross, chaplain staff and legal staff, and foreign and domestic media. All allegations of illegal conduct by U.S. personnel are reviewed, and when appropriate investigated and addressed in a timely manner.

(1503 pp. 29-35)

As stated in the Annex to the CAT Report at the pages noted below:

Detainees receive… Adequate clothing, including shoes, uniforms, and hygiene items.

(DoD Annex to the CAT Report, p. 17)

An interpreter is provided to the detainee, if necessary [in context of Combatant Status Review Tribunals].
(DoD Annex to CAT Report, p. 9)

c. Health, Diet, Medical Treatment (#15, 16, 17, 18, 20, 30, 31)

Q15. Please provide details of the rules and procedures in place for ensuring confidentiality of medical records of detainees. In particular, please comment on the access of interrogators to medical records of detainees.

Q16. Please provide details on the number of suicide attempts and deaths by suicide among detainees.

Q17. How many of the detainees have died, for which reasons? Please inform us about the outcome of relevant investigations.

Q18. Please indicate which detainees were or currently are on hunger strike.

Q20. Was the detainees' diet prepared according to their needs and beliefs?

Q30. Please comment on the role of all health professionals in the interrogation of detainees.

Q31. Please provide details of reporting lines/chain of command for all health professionals.

As the United States stated in its response to a UN CHR 1503 procedure, dated January 2005, page 41:

The Department of Defense advises that it is providing detainees at Guantanamo with excellent medical care. In March 2003, a special mental health unit was opened in Guantanamo where detainees suffering from depression or other psychological difficulties or diseases receive individualized care and supervision. Although there have been suicide attempts by detainees, discovery and rapid intervention by military guards

have prevented detainee deaths. These individuals were also seen by medical personnel. These attempts are taken seriously, and the United States makes every effort to prevent them.
(1503 p. 41)

The detainees receive three meals per day that meet cultural and dietary requirements, and they also receive adequate shelter and clothing.

(1503 p. 41)

A DoD memorandum on medical program principles and procedures, dated June 3, 2005, reads as follows.

The Assistant Secretary of Defense
June 3, 2005

Subject: Medical Program Principles and Procedures for the Protection and Treatment of Detainees in the Custody of the Armed Forces of the United States

This memorandum is issued under the authority of reference (a) and reaffirms the historic responsibility of health care personnel of the Armed Forces (to include physicians, nurses, and all other medical personnel including contractor personnel) to protect and treat, in the context of a professional treatment relationship and established principles of medical practice, all detainees in the custody of the Armed Forces during armed conflict. This includes enemy prisoners of war, retained personnel, civilian internees, and other detainees.

It is the policy of the Department of Defense Military Health System that health care personnel of the Armed Forces and the Department of Defense (particularly physicians) will perform their duties consistent with the following principles.

HEALTHAFFAIRS

Principles

1. Health care personnel charged with the medical care of detainees have a duty to protect their physical and mental health and provide

appropriate treatment for disease. To the extent practicable, treatment of detainees should be guided by professional judgments and standards similar to those that would be applied to personnel of the U.S. Armed Forces.

2. All health care personnel have a duty in all matters affecting the physical and mental health of detainees to perform, encourage and support, directly and indirectly, actions to uphold the humane treatment of detainees.

3. It is a contravention of DoD policy for health care personnel to be involved in any professional provider-patient treatment relationship with detainees the purpose of which is not solely to evaluate, protect or improve their physical and mental health.

4. It is a contravention of DoD policy for health care personnel:

    a. To apply their knowledge and skills in order to assist in the interrogation of detainees in a manner that is not in accordance with applicable law;
    b. To certify, or to participate in the certification of, the fitness of detainees for any form of treatment or punishment that is not in accordance with applicable law, or to participate in any way in the infliction of any such treatment or punishment.

5. It is a contravention of DoD policy for health care personnel to participate in any procedure for applying physical restraints to the person of a detainee unless such a procedure is determined in accordance with medical criteria as being necessary for the protection of the physical or mental health or the safety of the detainee himself or herself, or is determined to be necessary for the protection of his or her guardians or fellow detainees, and is determined to present no serious hazard to his or her physical or mental health.

Procedures

Consistent with the foregoing principles, the following procedures are established.

1. Medical Records: Accurate and complete medical records on all detainees shall be created and maintained in accordance with reference (b).

2. Treatment Purpose: Health care personnel engaged in a professional provider patient treatment relationship with detainees shall not undertake detainee-related activities for purposes other than health care purposes. Such health care personnel shall not actively solicit information from detainees for purposes other than health care purposes. Health care personnel engaged in non-treatment activities, such as forensic psychology or psychiatry, behavioral science consultation, forensic pathology, or similar disciplines, shall not also engage in any professional provider-patient treatment relationship with detainees.

3. Medical Information: Under U.S. and international law and applicable medical practice standards, there is no absolute confidentiality of medical information for any person. Detainees shall not be given cause to have incorrect expectations of privacy or confidentiality regarding their medical records and communications. However, whenever patient-specific medical information concerning detainees is disclosed for purposes other than treatment, health care personnel shall record the details of such disclosure, including the specific information disclosed, the person to whom it was disclosed, the purpose of the disclosure, and the name of the medical unit commander (or other designated senior medical activity officer) approving the disclosure. Analogous to legal standards applicable to U.S. citizens, permissible purposes include to prevent harm to any person, to maintain public health and order in detention facilities, and any lawful law enforcement, intelligence, or national security related activity. In any case in which the medical unit commander (or other designated senior medical activity officer) suspects that the medical information to be disclosed may be misused, he or she should seek a senior command determination that the use of the information will be consistent with applicable standards.

4. Reporting Possible Violations: Any health care personnel who in the course of a treatment relationship or in any other way observes circumstances indicating a possible violation of applicable

standards, including those prescribed in references (b) and (c), for the protection of detainees, or otherwise observes what in the opinion of the health care personnel represents inhumane treatment of a detainee, shall report those circumstances to the chain of command. Health care personnel who believe that such a report has not been acted upon properly should also report the circumstances to the technical chain, including the Command Surgeon or Military Surgeon General concerned, who then may seek senior command review of the circumstances presented. As always, other reporting mechanisms, such as the Inspector General, criminal investigation organizations, or Judge Advocates, also may be used.

5. Training: The Secretaries of the Military Departments and Combatant Commanders shall ensure that health care personnel involved in the treatment of detainees or other detainee matters receive appropriate training on applicable policies and procedures regarding the care and treatment of detainees.

This memorandum, effective immediately, affirms as a matter of Department of Defense policy the professional medical standards and principles applicable within the Military Health System. This memorandum does not alter the legal obligations of health care personnel under applicable law. The principles and procedures contained in this memorandum and experience implementing them will be reviewed within six months, including input from interested parties outside DoD.

Regarding the request for information about the hunger strike, the United States provides the following information provided by the Department of Defense.

DoD Treatment of Detainee Hunger Strikers

- It is DoD policy that all health care personnel have a duty in all matters affecting the physical and mental health of detainees to perform, encourage, and support, directly and indirectly, actions to uphold the humane treatment of detainees. This duty applies similarly in the treatment of detainees who voluntarily chose to engage in a hunger strike.

- Refusals of food and water can be expected in any detained population as individuals may use fasting as a form of protest or to demand attention from authorities and the media or interfere with operations.

- Prevention of unnecessary loss of life of detainees through standard medical intervention, including involuntary medical intervention when necessary to prevent a detainee's death, using means that are clinically appropriate, is consistent with DOD policy.

- It is the policy of Joint Task Force (JTF) - GTMO to closely monitor the health status and avert the deaths of detainees engaged in hunger strikes. Every attempt is made to allow detainees to remain autonomous up to the point where failure to eat or drink might threaten their life or health. Medical personnel do everything in their means to monitor and protect the health and welfare of hunger striking detainees.

- JTF guards monitor and report the daily intake of food and water for detainees engaged in a voluntary fast. JTF guards do not provide medical care or treatment to a detainee that is necessitated as a result of that detainee's decision to voluntarily fast or engage in a hunger strike.

- Medical personnel conduct a complete medical record review, physical exam, food and fluid intake history, and psychological assessment of detainees who engage in a voluntary fast in order to ensure that the detainee's health is protected and to determine any appropriate, medically necessary treatment or intervention. Medical personnel provide detailed warnings to the detainee during this initial assessment of the dangers of failure to eat or drink.

- Detainees are admitted to the hospital when a medical officer determines that continuation of a voluntary fast could endanger the detainees' health or life. All efforts are made by medical personnel to convince the detainee to end the voluntary fast. If the medical officer determines that the detainee's life might be threatened without immediate intervention and the detainee persists in the fast, medical personnel may initiate protocols for involuntary refeeding.

- The use of a nasal tube for feeding detainees is an accepted medical practice. Medical personnel follow all appropriate DOD medical guidelines in the administration of this care for detainees.

- The voluntary fast underway involves 25 detainees and is closely monitored by JTF guards and medical personnel. There are currently 22 detainees in the hospital. The detainees are clinically stable and will continue to receive nutrition and fluids as needed.

- The voluntary fast began on 8 August 2005.

- The JTF is taking actions to safeguard detainees from harm. This includes augmenting the detainee hospital with additional medical staff.

d. <u>Religious Observance (#19, 21, 22, 23, 24, 25)</u>

Q19. Are there any facilities offered to the detainees to practice their religious beliefs? Is there any space in the detention center designed to serve as a place of worship or place for prayers?

Q20. Was the detainees' diet prepared according to their needs and beliefs?

Q21. Do the detainees have access to the members of their clergy or other religious practitioners or are they authorized to receive them in their place of detention? Are there any set times for prayers?

Q22. Do they receive or do they have access to the sacred texts of their religion?

Q23. Have there been any acts or declarations aimed at discrediting, insulting or humiliating the religious feelings of detainees or the detainees? If yes, had there been any investigation and what have been the results of the investigations?

Q24. Is there any training or briefing provided to detention personnel with regard to the religious beliefs of the detainees?

Q25. Are there any specific internal regulations related to the religion of detainees in force at the places of detention?

DoD American Forces Press Service reported as follows on June 29, 2005:

Joint Task Force Respects Detainees' Religious Practices

WASHINGTON, June 29, 2005 - Members of Joint Task Force Guantanamo, Cuba, go to great lengths to respect the religious practices and beliefs of an estimated 520 enemy combatants being detained there, senior task force leaders told Congress today.
Officials described a sweeping program that ranges from educating servicemembers about Muslim beliefs and sensitivities to incorporating those religious practices into nearly every aspect of camp life.

The procedures are so strict, one member of the House Armed Services Committee quipped during today's hearing that "Guantanamo may be the only place in Cuba where religious freedom is allowed."

Army Command Sgt. Maj. Anthony Mendez from the task force's Joint Detention Group explained to committee members the procedures in place to respect Islam practices.

A loudspeaker at the camp signals the Muslim "call to prayer" five times a day - generally at 5:30 in the morning, 1 and 2:30 in the afternoon, and 7:30 and 9:30 at night, Mendez said.

Once the prayer call sounds, detainees get 20 minutes of uninterrupted time to practice their faith, he said. Those who choose to can take advantage of the prayer caps, beads and oil given to them as part of their basic-issue items and pray toward the Muslim holy city of Mecca, in the direction designated by arrows painted in each detainee cell and all common areas. Detainees who display good behavior and abide by camp rules receive traditional Islam prayer rugs as well, Mendez said.

The Joint Task Force Guantanamo Bay staff strives to ensure detainees aren't interrupted during the 20 minutes following the prayer call, even if they're not involved in religious activity, Mendez said.

Staff members schedule detainee medical appointments, interrogations and other activities in accordance with the prayer call schedule. They also post traffic triangles throughout Camp Delta to remind task force members not to disrupt the 20-minute observation period, Mendez explained.

Strict measures in place throughout the facility ensure appropriate treatment of the Koran, the Muslim holy book.

Every detainee at the facility is issued a personal copy of the Koran, and it is displayed in detainee cells "in plain view and above eye level," Mendez said. This serves two purposes, he said, discouraging detainees from hiding contraband inside its pages and reducing the likelihood of a guard accidentally bumping it or touching it during a cell search.

"The rule of thumb for the guards is that you will not touch the Koran," Mendez said. "That's the bottom line."

In the rare event that guards must touch or move a Koran, they follow strict procedures, all carried out wearing cream-colored latex gloves, Mendez explained. In moving a Koran, they use two hands, place it on a white towel and wrap the towel to cover it, then carry it above waist level. Whenever possible, they do this movement with the assistance of a linguist or translator.

Army Brig. Gen. Jay Hood, commander of Joint Task Force Guantanamo, said the task force respects Muslim dietary practices, flying in food that meets strict Islamic certification requirements and serving only menu items permitted under Muslim law.

The task force also pays tribute to Islamic holy periods, like Ramadan, modifying meal schedules to meet the strict fasting requirements and even offering detainees figs and honey at appropriate times, he said.

To ensure members of Joint Task Force Guantanamo understand Islamic practices, all undergo a program of sensitivity training before their assignments, Hood said. They learn about cultural differences and how to observe them on the job, from how to use their hands to what to do with their feet to whether it's appropriate for a detainee to be required to look into the eyes of a woman guard when she's talking to him, he said.

Once they report to Guantanamo Bay for duty, new task force members get "walked through" these practices and procedures to ensure they understand them, he said.

Hood told the congressional panel he's convinced that Joint Task Force Guantanamo is doing everything possible to ensure religious freedom for detainees.

"I don't see how anybody can look to the efforts we have put into (ensuring detainees' freedom to practice their religion)" and believe otherwise, he said.

The United States reported the following information to the Special Rapporteur on Freedom of Religion or Belief on August 17, 2005:

Asma Jahangir
Special Rapporteur on Freedom of Religion or Belief
Geneva

Ms. Asma Jahangir
Special Rapporteur on freedom of
religion or belief
Office of the High Commissioner
for Human Rights
Palais des Nations
CH-1211 Geneva 10

Dear Ms. Jahangir:

The Government of the United States welcomes the opportunity to respond to your letter of May 23, 2005, regarding allegations of Koran mishandling at the United States detention facility in Guantanamo Bay, Cuba. The Department of Defense (DoD) completed its investigation into this matter on June 3, 2005. In 31,000 documents covering 28,000 interrogations and countless thousands of interactions with detainees, the DoD investigation found five incidents of apparent mishandling by guards or interrogators. The following information details the circumstances and findings of the investigation.

As President Bush, Secretary Rice, and other officials, including our ambassadors and other personnel around the world, have reiterated the entire national history of the United States is bound together by a fundamental respect for religious freedom. Desecration of religious texts and objects is repugnant to our common values and anathema to the American people. The Government of the United States maintains its firm commitment to respect for religious freedom as recognized by the First Amendment of the United States Constitution, the International Covenant on Civil and Political Rights, Article 18 of the Universal Declaration of Human Rights, and the Declaration on the Elimination of Discrimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief. The United States is particularly dedicated to respecting the religious and cultural dignity of the Koran and the detainees' practice of faith.

While detention personnel are required to handle the Koran to conduct periodic security checks and searches, the Department of Defense takes special precautions to ensure that this is handled in a respectful manner. To this end, the Joint Task Force has carefully implemented a standard operating procedure that makes every effort to provide detainees with religious articles associated with the Islamic faith, accommodate prayers and religious periods, and provide culturally acceptable meals and practices. For instance, the Joint Task Force conducts a call to prayer, which is played over the loudspeakers at the appropriate times every day, and there are stenciled arrows pointing in the direction of Mecca which are displayed throughout Guantanamo to assist the detainees in knowing in what direction to pray. Any incidents of intentional mishandling of the Koran are rare and are never condoned. Procedures have been put into place to help ensure respect for the cultural dignity of the Koran and the detainees' practice of faith since early 2003. A copy of the current procedures is attached for your reference.

Your inquiries specifically pertain to allegations of mishandling of the Koran during guard and interrogator interactions with detainees at the Guantanamo Bay detention facility, with specific reference to a claim that a Koran was flushed down the toilet. These allegations were the focus of an in-depth investigation that concluded on June 3, 2005, which aimed to determine the validity of these claims, improve standard operating procedures for handling religious material, and make accountable any individuals who failed to observe the rules in place for handling religious items, including the Koran. This investigation found no credible evidence that a member of U.S. military personnel responsible for providing security

for Al Qaeda detainees under U.S. control at Guantanamo Bay, Cuba, known as the Joint Task Force, ever flushed a Koran down the toilet. Further findings in the final report of this investigation are provided herein.

On May 5, 2005, the United States Department of Defense launched a thorough investigation of allegations concerning mishandling of the Koran. This investigation was led by Brigadier General Jay Hood, Commander of the Joint Task Force at Guantanamo Bay, Cuba, who included within the scope of his inquiry all instances of mishandling of the Koran, with specific focus on the allegation that a Koran may have been flushed down a toilet. As part of his investigation, General Hood asked that the following information be compiled:

> Any information pertaining to the allegation that a U.S. service member flushed a Koran down a toilet.
>
> The documented procedures for handling the Koran from January 2002 to the present.
>
> Any identified incidents where Joint Task Force personnel failed to follow established procedures.
>
> Recommendations for changes to be made to the current procedures for handling the Koran and other religious items provided to the detainees at the Guantanamo Bay detention facility.

The United States takes allegations of misconduct seriously. In the course of this investigation, General Hood and his investigators studied all available detainee records, press articles and habeas petitions in search of any information pertaining to the Koran. This involved an examination of over three years worth of records. Based on this investigation, General Hood made the following findings:

> There is no credible evidence that a member of the Joint Task Force at Guantanamo Bay ever flushed a Koran down the toilet. An interview with the detainee who reportedly made this allegation revealed that he was not/not a witness to any such mistreatment and no other claims of this type have been made. This matter is considered closed.

Since Korans were first issued to detainees in January 2002, the Joint Task Force has issued more than 1,600 copies, conducted over 28,000 interrogations, and made thousands of cell moves, in which detainees' effects, including Korans, were moved. From those activities, only nineteen incidents involving handling of the Koran by Joint Task Force personnel were identified.

Of these nineteen incidents, ten incidents did not involve mishandling of the Koran. Rather, they involved the touching of a Koran during the normal performance of duty.

The other nine incidents involved intentional or unintentional mishandling of a Koran. General Hood identified seven incidents (four confirmed) where a guard may have mishandled a Koran. In two additional instances (one confirmed), an interrogator may have mishandled a Koran.

The investigation has also revealed fifteen cases in which the detainees themselves mishandled or inappropriately treated the Koran. One specific example includes a detainee who ripped pages out of his own Koran.

With regards to the five confirmed incidents of Koran mishandling, the Joint Task Force specifically found:

(1) During an interrogation in February 2002, a detainee complained that guards at Camp X-ray kicked the Koran of a detainee in a neighboring cell four to five days earlier. The interrogator reported the first detainee's complaint in a memorandum dated February 27, 2002. The interrogator confirmed that the guards were aware of the detainee's complaint. There is no evidence of further investigation concerning this incident; however, we consider this a confirmed incident.

(2) On August 15, 2003, two detainees complained to the swing shift guards (1400-2200 hours) that the detainees' Korans were wet because the night shift guards had thrown water balloons on the cellblock. The swing shift guards recorded the complaints in the block blotter log, a written log used by the guards to record detainee requests, complaints, visitors and incidents in cells and cellblocks, in

accordance with normal procedures. We have not determined if the detainees made further complaints or if their Korans were replaced. There is no evidence that this incident was investigated. There is no evidence that the incident, although clearly inappropriate, caused any type of disturbance on the cellblock. We consider this a confirmed incident.

(3) On August 21, 2003, a detainee complained to a guard that a two-word obscenity had been written in English on the inside cover of his English-language Koran and he asked to complain to the commander. The complaint was recorded in the Detainee Information Management System (DIMS). The Joint Task Force uses the DIMS, an automated electronic blotter system, to track information on individual detainees' cells and cellblocks. After the incident, the English-language Koran was taken from the detainee who retained his Arabic-language Koran. We have no record indicating whether the detainee formally complained to the commander. We have found no evidence to confirm who wrote in the detainee's English-language Koran. The detainee speaks English and the detainee wrote in his own Koran; however, we consider this a confirmed incident.

(4) On March 25, 2005, a detainee complained to the guards that urine came through an air vent in Camp 4 and splashed on him and his Koran while he lay near the air vent. A guard reported to a cellblock commander that he was at fault. The guard had left his observation area post and went outside to urinate. He urinated near an air vent and the wind blew his urine through the vent into the cellblock. The Sergeant of the Guard (SOG) responded and immediately relieved the guard from duty. The SOG ensured the detainee received a fresh uniform and a new Koran. The Joint Detention Operations Group (JDOG) commander reprimanded the guard and assigned him to gate guard duty where he had no contact with detainees for the remainder of his assignment with the Joint Task Force. This incident was recorded in a series of contemporaneous sworn statements made by Camp 4 guard force members. There is no record that this incident caused any type of disturbance in the cellblock. We consider this a confirmed incident.

(5) On July 25, 2003, a contract interrogator apologized to a detainee for stepping on the detainee's Koran in an earlier interrogation. The memorandum of the July 25, 2003 interrogation session shows that the detainee had reported to other detainees that his Koran had been stepped on. The detainee accepted the apology and agreed to inform other detainees of the apology and ask them to cease disruptive behaviors caused by the incident. The interrogator was later terminated for a pattern of unacceptable behavior, an inability to follow direct guidance and poor leadership. We consider this a confirmed incident.

These incidents were investigated and confirmed in accordance with the Standard Operating Procedure for the Joint Task Force at Guantanamo Bay in handling the Koran. Please see the attached annex for excerpts of the relevant sections of these Procedures.

The United States must stress that the large majority of incidents of Koran mishandling thus far have been found to be unintentional and in compliance with standard operating procedures.

As part of this investigation, General Hood has determined that the current guidance to the guard force for handling the Koran is adequate, although a number of recommendations for minor modifications are under review. The procedures put into place to help ensure respect for the cultural dignity of the Koran and the detainees' practice of faith were crafted in consultation with the International Committee of the Red Cross and have essentially remained unchanged since formal detention operations began in early 2003.

The Government of the United States maintains its respect for religious freedom and continues to be careful in drafting operating guidelines that provide for religious sensitivity in interactions with detainees at Guantanamo Bay.

It is important to note the number of Korans (some 1,600) which have been distributed as part of a concerted effort by the US government to facilitate the desires of detainees to freely worship, and the small number of very regrettable incidents should be seen in light of the volume of efforts to facilitate free religious practice.

We hope that the above information addresses your concerns and appreciate your serious attention to this matter.

Standard Operating Procedures

6-5. Searching the Koran

a. To ensure the safety of the detainees and guards while respecting the cultural dignity of the Koran thereby reducing the friction over the searching the Koran. JTF-GTMO personnel directly working with detainees will avoid handling or touching the detainee's Koran whenever possible. When military necessity does require the Koran to be searched, the subsequent procedures will be followed.

(1) The guard informs the detainee that the Chaplain or a Muslim interpreter will inspect the Koran. If the detainee refuses the inspection at any time, the noncompliance is reported to the DOC and logged appropriately by the Block NCO.

(2) The Koran will not be touched or handled by the guard.

(3) The Chaplain or Muslim interpreter will give instructions to the detainee who will handle the Koran. He may or may not require a language specific interpreter.

(4) The inspector is examining to notice unauthorized items, markings, or any indicators that raises suspicion about the contents of the Koran.

(5) The inspector will instruct the detainee to first open the one cover with one hand while holding the Koran in the other thus exposing the inside cover completely.

(6) The inspector instructs the detainee to open pages in an upright manner (as if reading the Koran). This is a random page search and not every page is to be turned. Pages will be turned slowly enough to clearly see the pages.

(7) The inspector has the detainee show the inside of the back cover of the Koran.

(8) The detainee is instructed to show both ends of the Koran while the book is closed so that the inspector can note the binding while closed paying attention to abnormal contours or protrusions associated with the binding. The intent is to deduce if anything may be in the binding without forcing the detainee to expose the binding, which may be construed as culturally insensitive or offensive given the significance of the Koran.

(9) How the detainee reacted, observation by other detainees, and other potentially relevant observations will be annotated in DIMS.

b. Handling.

(1) Clean gloves will be put on in full view of the detainees prior to handling.

(2) Two hands will be used at all times when handling the Koran in manner signaling respect and reverence. Care should be used so that the right hand is the primary one used to manipulate any part of the Koran due to the cultural association with the left hand. Handle the Koran as if it were a fragile piece of delicate art.

(3) Ensure that the Koran is not placed in offensive areas such as the floor, near the toilet or sink, near the feet, or dirty/wet areas.

c. Removal.

(1) Koran must be transported by the detainee, in the event the detainee is moved to another cell or block.

(2) If a Koran must be removed at the direction the CJDOG, the detainee library personnel, Muslim interpreter, or Chaplain will be contacted to retrieve and properly store the Koran in the detainee library. The request for the librarian, interpreter, or Chaplain, as well as the retrieval itself, will be logged in DIMS.

(3) If the Chaplain, librarian, or Muslim interpreter, within the needs of the situation, cannot remove the Koran, then the guard may remove the Koran after approved by the DOC (who notes this in the DIMS) IAW the following procedures:

(a) Clean gloves will be put on in full view of the detainees prior to handling.

(b) Two hands will be used at all times when handling the Koran in manner signaling respect and reverence.

(c) Place a clean, dry, detainee towel on the detainee bed and then place the Koran on top of the clean towel in a manner, which allows it to be wrapped without turning the Koran over at any time in a reverent manner. Ensure that the Koran is not placed in offensive areas such as the floor, near the toilet or sink, near the feet, or dirty/wet area when doing this activity.

(4) How the detainee reacted, observation by other detainees, and other potentially relevant observations will be annotated appropriately in the DIMS significant activities menu.

(5) The Koran shall be returned to the librarian, Chaplain, or DOC (in that order).

(6) Korans are the property of the U.S. Government and as such will remain in the cells only to be removed at the CJDOG's decision.

(7) If a Koran is damaged or destroyed by a detainee, the chaplain in conjunction with a Muslim interpreter will take the Koran from the detainee for a minimum of ten days noted in DIMS. At that point, the chaplain can reissue the Koran to the detainee. The chaplain must ensure the block knows the Koran is being taken to protect the Koran, not to punish the detainee.

16-14. Cultural Considerations

a. Do not disrespect the Koran (let it touch the floor, kick it, step on it).

(1) Muslims wash their hands before touching the Koran; non-Muslims should minimize touching a detainee's Koran, however, when it needs to be handled, it should be handled respectfully.

(2) Disrespecting the Koran could lead to a lack of cooperation from the detainees and could provoke a violent reaction from detainees.

32-17. Camp Coordinated Contraband Search & Seizure

(3) DO NOT TOUCH THE KORANS.

Please see response under section b above with regard to training of United States military personnel at Guantanamo.

e. Investigations (#13, 28)

Q13. What investigations of conditions of detention have been conducted? Please share the results with us.

Q28. Please provide comprehensive information about all cases of torture (including all the relevant evidence) investigated in the past or currently being investigated and about the prosecution of perpetrators.

As the United States stated in its Annex to the CATreport, pp 19-23:

B. Allegations of Mistreatment of Persons Detained by the Department of Defense

1. Introduction

The United States is well aware of the concerns about the mistreatment of persons detained by the Department of Defense in Afghanistan and at Guantanamo Bay, Cuba. Indeed, the United States has taken and continues to take all allegations of abuse very seriously. Specifically, in response to specific complaints of abuse in Afghanistan and at Guantanamo Bay, Cuba, the Department of Defense has ordered a number of studies that focused, inter alia, on detainee operations and interrogation methods to determine if there was merit to the complaints of mistreatment.

Although these extensive investigative reports have identified problems and proffered recommendations, none of them found that any governmental policy directed, encouraged or condoned these abuses. The reports pertaining to Guantanamo Bay are summarized [below].

In general, for both Afghanistan and Guantanamo Bay, these reports have assisted in identifying and investigating all credible allegations of abuse. When a credible allegation of improper conduct by DoD personnel surfaces, it is reviewed, and when factually warranted, investigated. As a result of investigation, administrative, disciplinary, or judicial action is taken as appropriate. Those credible allegations were and are now being resolved within the Combatant Command structure.

Concerns have also been generated by an August 1, 2002, memorandum prepared by the Office of Legal Counsel (OLC) at the U.S. Department of Justice (DOJ), on the definition of torture and the possible defenses to torture under U.S. law and a DoD Working Group Report on detainee operations, dated April 4, 2003, the latter of which was the basis for the Secretary of Defense's approval of certain counter resistance techniques on April 16, 2003. The 2002 DOJ OLC memorandum was withdrawn on June 22, 2004 and replaced with a December 30, 2004, memorandum interpreting the legal standards applicable under 18 U.S.C. 2340-2340A, also known as the Federal Torture Statute. See Annex 2.

On March 10, 2005 Vice Admiral Church (the former U.S. Naval Inspector General) released an executive summary of his report, which included an examination of this issue. His report examined the precise question of "whether DoD had promulgated interrogation policies or guidance that directed, sanctioned or encouraged the abuse of detainees." Church Report, Executive Summary, at 3, released March 10, 2005 (relying upon data available as of September 30, 2005) (at <http://www.defenselink.mil/news/Mar2005/d20050310exe.pdf> (visited March 23, 2005)). In his report, he wrote that "this was not the case," id., finding that "it is clear that none of the approved policies - no matter which version the interrogators followed - would have permitted the types of abuse that occurred." Id., at 15. In response to intensive questioning before the U.S. Senate Armed Services Committee as to whether the 2002 DOJ memo or subsequently authorized interrogation practices had contributed to individual soldiers committing abuses, he responded that "clearly there was

no policy, written or otherwise, at any level, that directed or condoned torture or abuse; there was no link between the authorized interrogation techniques and the abuses that, in fact, occurred." Transcript at 7. Although Vice Admiral Church's investigation is the most comprehensive to date on this issue, it was consistent with the findings of earlier investigations on this point. See, e.g., Army Inspector General Assessment, released July 2004 (at <http://www4.army.mil/ocpa/reports/ArmyIGDetaineeAbuse/index.html > (visited March 1, 2005)).

Vice Admiral Church's finding was also consistent with earlier statements by high-level U.S. officials, including by the previous White House Counsel Alberto Gonzales, who had stated:

> The administration has made clear before and I will reemphasize today that the President has not authorized, ordered or directed in any way any activity that would transgress the standards of the torture conventions or the torture statute, or other applicable laws.
> . . . .
>
> . . . [L]et me say that the U.S. will treat people in our custody in accordance with all U.S. obligations including federal statutes, the U.S. Constitution and our treaty obligations. The President has said we do not condone or commit torture. Anyone engaged in conduct that constitutes torture will be held accountable.

Press Briefing by White House Counsel Judge Alberto Gonzales, DoD General Counsel William Haynes, DoD Deputy General Counsel Daniel Dell'Orto and Army Deputy Chief of Staff for Intelligence General Keith Alexander, June 22, 2004, (at <http://www.whitehouse.gov/news/releases/2004/06/20040622-14.html> (visited February 28, 2005)).

Subsequent to the release of the December 2004 DOJ memo interpreting the Federal Torture Statute, the Deputy Secretary of Defense ordered a "top-down" review within the Department to ensure that the policies, procedures, directives, regulations, and actions of the department comply fully with the requirements of the new Justice Department

Memorandum.[4] The Office of Detainee Affairs in the Office of the Under Secretary of Defense for Policy coordinates this process of review.

2. Reports of Abuses, Summary of Abuse Investigations and Actions to Hold Persons Accountable - Guantanamo Bay

As described above in the introductory section, there have been multiple reports resulting from investigations concerning the treatment of detainees at Guantanamo Bay. For example, the Naval Inspector General reviewed the intelligence and detainee operations at Guantanamo Bay to ensure compliance with DoD orders and policies. The review, conducted in May 2004, concluded that the Secretary of Defense's directions with respect to humane treatment of detainees and interrogation techniques were fully implemented. The Naval Inspector General documented eight minor infractions involving contact with detainees as stated below (two additional incidents occurred after this investigation was completed). In each of those cases, the chain of command took swift and effective action. Administrative actions ranging from admonishment to reduction in grade.[5]

In a subsequent report, the Naval Inspector General engaged in a comprehensive review of DoD detention operations and detainee interrogation operations covering not only Guantanamo, but Iraq and Afghanistan. This report expanded upon his earlier finding with respect to interrogation operations at Guantanamo, noting that while "there have been over 24,000 interrogation sessions since the beginning of interrogation operations, there are only three cases of closed, substantiated interrogation-related abuse, all consisting of minor assaults in which MI interrogators exceeded the bounds of approved interrogation policy." Church Report,

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[4] Department of Defense Memorandum (Jan. 27, 2005).

[5] *See* 10 U.S.C. § 815. The intent of nonjudicial punishment (colloquially referred to as an "Article 15" or "Captain's Mast") is to provide the commander with enough latitude to resolve a disciplinary problem appropriately in order to maintain "good order and discipline" within the unit. Nonjudicial punishment is designed for minor offenses. It allows a commander to correct, educate, and reform offenders while simultaneously preserving the service member's record of service from unnecessary stigma and furthering military efficiency. A service member is provided appropriate due process rights when considered for nonjudicial punishment. The service member has the right to consult with counsel, the right to remain silent, turn down the nonjudicial punishment and, in turn, possibly face trial by court-martial (unless attached to or embarked upon a vessel), request an open hearing, a spokesperson to speak on the service member's behalf at the hearing, examine all available evidence, present evidence and call witnesses, and, if nonjudicial punishment is imposed, the right to appeal.

Executive Summary, at 14, released March 10, 2005 (using data as of September 30, 2004) (at <www.defenselink.mil/news/Mar2005/d20050310exe.pdf> (visited March 23, 2005)). He highlighted that "[w]e found no link between approved interrogation techniques and detainee abuse." Id., at 13.

[Update dated October 18, 2005: On December 29, 2004, the Commander, U.S. Southern Command appointed two General Officers, Lieutenant General Randall M. Schmidt, and Brigadier General John T. Furlow, to investigate the facts and circumstances surrounding allegations of detainee abuse contained in documents released under the Freedom of Information Act, including those released by the Federal Bureau of Investigation, and to conduct an inquiry into any credible allegation contained in those documents. That investigation was completed on July 9, 2005. General Craddock, Lieutenant General Schmidt, and Brigadier General Furlow testified in an open hearing before the Senate Armed Services Committee on July 13, 2005, concerning their findings and conclusions. The report has been briefed to the United States Congress; however, the report as a whole is classified and has not been publicly released. Lieutenant General Schmidt testified that he found no evidence to substantiate the allegations of torture or inhumane treatment contained in the documents released under the Freedom of Information Act.]

Therefore, although there have been allegations of serious abuse of detainees at Guantanamo Bay, the United States has not found evidence substantiating such claims. Instead, it has identified ten substantiated incidents[6] of misconduct at Guantanamo:

- A female interrogator inappropriately touched a detainee on April 17, 2003 by running her fingers through the detainee's hair, and made sexually suggestive comments and body movements, including sitting on the detainee's lap, during an interrogation. The female interrogator received a written admonishment and additional training.

[6] There has also been an investigation in response to a request by the Australian Government following claims of mistreatment of two Australian detainees at Guantanamo. Although not initially substantiated, the Naval Criminal Investigative Service is conducting an independent investigation into these allegations of abuse.

- On April 22, 2003, an interrogator assaulted a detainee by directing military policemen repeatedly to bring the detainee from a standing to a prone position and back. A review of medical records indicated superficial bruising to the detainee's knees. The interrogator received a letter of reprimand.

- A female interrogator, at an unknown date, in response to being spit upon by a detainee, assaulted the detainee by wiping red dye from a red magic marker on the detainee's shirt and telling the detainee that the red stain was blood. The interrogator received a verbal reprimand for her behavior.

- In October 2002, an interrogator used duct tape to tape shut the mouth of a detainee who was being extremely disruptive during an interrogation. The tape did not harm the detainee and the interrogator received a verbal reprimand for his behavior.

- A military policeman (MP) assaulted a detainee on September 17, 2002, by attempting to spray him with a hose after the detainee had thrown an unidentified, foul-smelling liquid on the MP. The MP received non-judicial punishment that included seven days restriction and reduction in grade from Specialist (E-4) to Private First Class (E-3).

- On March 23, 2003, after a detainee threw unidentified liquid on an MP, the MP sprayed the detainee with pepper spray. The MP declined non-judicial punishment,[7] and he was subsequently tried by special court-martial where he was acquitted of all charges.

- On April 10, 2003, after a detainee had struck an MP in the face (causing the MP to lose a tooth) and bitten another MP, the MP struck the detainee with a handheld radio. This MP was given non-judicial punishment, received 45 days extra-duty, and was reduced in grade from Specialist (E-4) to Private First Class (E-3).

- On January 4, 2004, an MP platoon leader received an initial allegation that one of his guards had thrown cleaning fluid on a detainee and later made inappropriate comments to the detainee.

[7] *See* description, *id.*

The platoon leader, however, did not properly investigate the allegation or report it to his chain of command. The initial allegation against the guard ultimately turned out to be substantiated. The MP was given non-judicial punishment and received forfeiture of pay of $150 per month for two months and reduction in grade from Private (E-2) to Private (E-1). The platoon leader was issued a reprimand for dereliction of duty.

- On February 10, 2004, an MP inappropriately joked with a detainee, and dared the detainee to throw a cup of water on him. After the detainee did so, the MP threw a cup of water on the detainee. The MP was removed from further duty because of these inappropriate actions.

- On February 15, 2004, a barber intentionally gave two detainees unusual haircuts, including an "inverse Mohawk," in an effort to frustrate the detainees' request for similar haircuts as a sign of unity. The barber and his company commander were both counseled because of this incident.

The above list of substantiated abuses and the subsequent punishment of those responsible at Guantanamo Bay demonstrates that misconduct will not be tolerated.

(DoD Annex to the CAT Report pp. 19-23)

Further, as the United States stated in its response to a UN CHR 1503 procedure, dated January 2005, pages 31, 35:

The United States is aware of previous allegations of mistreatment of detainees at Guantanamo as reflected in recently released Federal Bureau of Investigation documents and concerns about treatment reportedly expressed by officials of the International Committee of the Red Cross. The United States deeply regrets any instances of abuse of detainees anywhere. Allegations of abuse are investigated by appropriate U.S. officials, and steps are taken to hold accountable persons found responsible for such acts. Independent investigations documented eight instances of infractions at Guantanamo. Each of the eight credible allegations of mistreatment or abuse was thoroughly investigated, and the military command acted quickly

and appropriately to the actions of those involved in wrongdoing. Punishments ranged from admonishment to court-martial.
(1503 p. 31)

Official reviews at Guantanamo include the following.

1. Naval Inspector General (IG) Review. The Naval Inspector General, Vice Admiral (VADM) Church, reviewed the intelligence and detainee operations at Guantanamo to ensure compliance with DOD orders and policies. VADM Church concluded that the detention facility was a professional organization staffed by personnel who clearly understood their roles and responsibilities. VADM Church documented eight minor infractions involving contact with detainees. Four of these involved guards, three involved interrogators, and one involved a barber. In each of those cases, the chain of command took swift and effective action. Administrative actions ranged from admonishment to reduction in rank. One service member was tried by court-martial and was acquitted.

2. Investigations into individual allegations of abuse. Individual allegations of abuse are promptly investigated. Most notable were the investigations conducted at the direction of the Secretary of Defense in response to a request by the Australian Government following claims of mistreatment of two Australian detainees at Guantanamo. After a comprehensive review of the claims, the investigation revealed no information to support the abuse allegations.

3. Further, the Naval Criminal Investigative Service is conducting an independent investigation into these allegations of abuse at the direction of the Deputy Secretary of Defense.

(1503 p. 35)

3. Proceedings (questions numbered 5, 6, 11, 32-43)

Q5. Are the persons detained at Guantanamo Bay entitled to challenge their detention before a court and if so, have they been brought promptly before a judicial authority? What is the basis for their right to challenge their detention or the basis of any limits on their right to do so?

Q6. Please describe the procedure applying to the review of their detention.

Q11. How many of the persons detrained at Guantanamo Bay are held in framework of criminal proceedings? What law, substantive and **procedural,** governs such criminal proceedings? What stage are the criminal proceedings at in each individual case? What is the average time spent in detention since they have been charged by those detained in the framework of criminal proceedings?

Q32. Please describe the legal basis for the criminal proceedings against persons detained at Guantanamo Bay. What law, substantive and procedural, is applied in such proceedings?

Q33. Please provide information about what crimes the detainees have been accused of. Have any of the detainees been formally charged, if so, please provide details of the specific charges set out in the indictments.

Q34. Please describe the legal basis for the determination of the court the detainees are brought before, and the rules applying to the selection, appointment and revocation of judges sitting on that court. Are judges and prosecutors civilians or military? Are hearings held in public?

Q35. Have they had access to a lawyer during their detention? If so, of their choice? Is legal assistance provided free of charge?

Q36. How often are they able to meet/contact their lawyer?

Q37. Are interviews between detainees and their lawyers held in private?

Q38. Are detainees that require interpreters provided with such a facility when presented to the tribunal or at meetings with their lawyers?

Q39. Do detainees and their lawyers have sufficient time and resources to prepare for their defense?

Q40. Please provide the rules of procedure governing the military trials. Please describe the way in which rules of evidence differ from those generally applied in U.S. courts (e.g. the Federal Rules of Evidence), in particular with regard to disclosure of evidence to the accused and his counsel (including access to official records of his interrogation), the adversarial character of proceedings, and the standard of proof for conviction.

Q41. Have any detainees been convicted/sentenced? If so, please provide details.

Q42. Is there a right of appeal of conviction and sentence?

Q43. Will transcripts of trial proceedings and judgments become available and be made public?

In its 1503 UN CHR response the United States describedjudicial and administrative proceedings as follows (pages 4-8, 13-14, 17-20).

Myriad Review Processes. As described above, the U.S. Supreme Court has determined that, under the federal habeas corpus statute, the appropriate district court has jurisdiction to hear habeas corpus petitions brought on behalf of detainees challenging their detention at Guantanamo. The Department of Defense has instituted Combatant Status Review Tribunals to allow each Guantanamo detainee an opportunity to contest his or her detention as an enemy combatant. Additionally, as described in detail below, the Department of Defense has established an individualized annual review procedure to determine whether persons classified as enemy combatants no longer pose a danger to the United States, and may therefore be released.

1. Supreme Court Decisions.

Among other issues, the Supreme Court reviewed whether the appropriate federal district court would have jurisdiction to consider a habeas corpus petition filed on behalf of enemy combatants held at Guantanamo and challenging the legality of their detention. Rasul and its companion case, Al Odah, cases brought on behalf of two Australians and 12 Kuwaitis, presented "the narrow but important question whether United

States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base, Cuba." (Rasul [124 S.Ct. 2686 (2004)1). The same issue of legality of the detention is squarely raised in the 1503 communication.

The Supreme Court held in Hamdi that our nation is entitled to detain enemy combatants, even American citizens, until the end of hostilities, in order to prevent the enemy combatants from returning to the field of battle and again taking up arms. The Court stated the detention of such individuals "is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate' force Congress has authorized the President to use" against "nations, organizations, or persons" associated with the September 11, 2001 terrorist attacks. (Slip Op. at 10, 11).

The Supreme Court ruled in Rasul that the District Court for the District of Columbia had jurisdiction to consider habeas challenges to the legality of the detention of foreign nationals at Guantanamo. (Slip Op. at 15-16).

(USG response to 1503 procedures p. 4-5)

2. Federal Habeas Corpus Litigation

The various habeas corpus petitions seek the detainees' release, claiming that the detentions violate the Fifth, Sixth, Eighth and Fourteenth Amendments and the War Powers and Article 1 Suspension clauses of the United States Constitution. Different petitions have also alleged claims under the Administrative Procedures Act, the Alien Tort Statute, Army Regulation 190-8, customary international law, and international treaties including the International Covenant on Civil and Political Rights and the Geneva Conventions of 1949.

During the course of these habeas corpus proceedings, the federal courts are reviewing numerous motions and other requests including motions to dismiss the petitions, motions for a restraining order regarding future transfers of detainees, requests for discovery, and motions relating to procedures regulating access of attorneys to individuals. For example, in August 2004, the federal district court in the cases of Gherebi, Boumediene and El Banna separately denied requests by petitioners for relief enjoining ongoing Combatant Status Review Tribunal (CSRT) proceedings. The

judges ruled that any alleged defect in the CSRT proceedings could be addressed in determining whether petitioners were ultimately entitled to any relief with regard to their detention.

Further, pursuant to briefing orders issued by Senior Judge Green, who is coordinating the numerous detainee cases (see http://www.dcd.uscourts.gov/GuantanamoResolution.pdf), the government has filed factual returns in most of the cases indicating both the classified and unclassified factual bases for the enemy combatant status of each petitioner-detainee based on the record of CSRT proceedings. Counsel for the detainees have full access to the records of the CSRT proceedings.

Additionally, in the Al Odah case, the federal district court issued a decision on October 20, 2004, denying the Government's proposed monitoring of attorney-client communications between three detainees and their counsel. In doing so, the court also imposed a number of conditions on detainees' counsel, including that any disclosure by counsel of communications with a detainee be subjected to a pre-disclosure classification review by the government.

In short, domestic judicial proceedings are available, ongoing, effective, and timely. Under the customary international law doctrine of exhaustion and under principles of sovereignty, timely and available domestic proceedings must be respected and allowed to run their course prior to international adjudication.

(USG response to 1503 procedures, p. 6-8)

As of [September 27, 2005, there are 160 habeas corpus cases involving 292] Guantanamo detainees pending before ten district court judges. These include 39 Yemenis, 26 Saudis, 11 Kuwaitis, 11 Moroccans, ten Algerians, six Bahrainis, seven Tunisians, five Jordanians, five Sudanese, four Syrians, four Mauritanians, three Chinese, three Egyptians, three Libyans, two each from Palestine and Chad; and one from each of the following: Qatar, Kazakhstan, Tajikistan, Uganda, Iraq, Australia, Canada, Somalia, Turkey, Afghanistan, Pakistan and Ethiopia. Additionally, a habeas corpus petition has been filed under the name of "John Doe" on behalf of all detainees who do not currently have habeas corpus petitions pending. Other detainees may have since filed habeas corpus petitions. Due to the recent transfer of four British, one Australian and one Kuwaiti

detainee, the government has moved to dismiss their petitions. Those motions are still pending.

On July 12-14, 2004, the United States notified all detainees then at Guantanamo of their opportunity to contest their enemy combatant status under this process, and that a federal court has jurisdiction to entertain a petition for habeas corpus brought on their behalf. The Government has also provided them with information on how to file habeas corpus petitions in the U.S. court system. (At http://www.defenselink.mil/news/Dec2004/d20041209ARB.pdf (visited March 1, 2005)). When the Government has added new detainees, it has also informed them of these legal rights.

The [habeas corpus]notification provided to each detainee sets forth procedures for filing a petition for a writ of habeas corpus through a friend or family member or directly to the court. http://www.defenselink.mil/news/Dec2004/d20041209HN.pdf. (1503 pp. 13-14)

The United States reported in its Annex to the CAT Report(page18) regarding habeas counsel visits: an updated version follows..

In addition, legal counsel representing the detainees in habeas corpus cases have visited detainees at Guantanamo since late August 2004. As of September 2005, Guantanamo has arranged visits for 70 different groups of counsel. These groups frequently consist of multiple lawyers and translators who stay at the base for several days to conduct interviews with multiple habeas petitioners they represent. To date over 110 detainees have personally met with habeas counsel at Guantanamo. A total of approximately 100 different habeas lawyers and translators have visited Guantanamo since August 2004, many of whom have made multiple visits to the base. The Government does not monitor these meetings (or the written correspondence between counsel and detainees), which occur in a confidential manner. The Government also allows foreign and domestic media to visit the facilities.

3. Combatant Status Review Tribunals

The United States reported as follows in the Annex to the CAT Report, pages 8-10.

Combatant Status Review Tribunals (CSRTs) for Detainees at Guantanamo Bay

Between August 2004 and January 2005, various Combatant Status Review Tribunals (CSRTs) have reviewed the status of all individuals detained at Guantanamo, in a fact-based proceeding, to determine whether the individual is still classified as an enemy combatant. As reflected in the Order establishing the CSRTs, an enemy combatant is "an individual who was part of or supporting Taliban or al-Qaida forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces." CSRT Order ¶B (at <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf> (visited March 1, 2005)). Each detainee has the opportunity to contest such designation. The Deputy Secretary of Defense appointed the Secretary of the Navy, The Honorable Gordon England, to implement and oversee this process. On July 29, 2004, Secretary England issued the implementation directive for the CSRTs, giving specific procedural and substantive guidance. (At <http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf> (visited March 1, 2005)). On July 12-14, 2004, the United States notified all detainees then at Guantanamo of their opportunity to contest their enemy combatant status under this process, and that a federal court has jurisdiction to entertain a petition for habeas corpus brought on their behalf. The Government has also provided them with information on how to file habeas corpus petitions in the U.S. court system. (At http://www.defenselink.mil/news/Dec2004/d20041209ARB.pdf(visited March 1, 2005)). When the Government has added new detainees, it has also informed them of these legal rights.

CSRTs offer many of the procedures contained in US Army Regulation 190-8. The Supreme Court specifically cited these Army procedures as sufficient for U.S. citizen-detainees entitled to due process under the U.S. Constitution. For example:

- Tribunals are composed of three neutral commissioned officers, plus a

non-voting officer who serves as a recorder;

- Decisions are by a preponderance of the evidence by a majority of the voting members who are sworn to execute their duties impartially;

- The detainee has the right to (a) call reasonably available witnesses, (b) question witnesses called by the tribunal, (c) testify or otherwise address the tribunal, (d) not be compelled to testify, and (e) attend the open portions of the proceedings;

- An interpreter is provided to the detainee, if necessary; and

- The Tribunal creates a written report of its decision that the Staff Judge Advocate reviews for legal sufficiency. *See* CSRT Implementation Memorandum, July 29, 2004 (at <http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf> (visited March 1, 2005)).

Unlike an Article 5 tribunal, the CSRT guarantees the detainee *additional* rights, such as the right to a personal representative to assist in reviewing information and preparing the detainee's case, presenting information, and questioning witnesses at the CSRT. The rules entitle the detainee to receive an unclassified summary of the evidence in advance of the hearing in the detainee's native language, and to introduce relevant documentary evidence. *See* CSRT Order ¶g(1); Implementation Memorandum Encl. (1) fflf F(8), H (5); CSRT Order ¶g(10); Implementation Memorandum Encl. (1) ¶ F (6). In addition, the rules require the Recorder to search government files for, and provide to the Tribunal, any "evidence to suggest that the detainee should not be designated as an enemy combatant." *See* Implementation Memorandum Encl. (2), ¶B(1). The detainee's Personal Representative also has access to the government files and can search for and provide relevant evidence that would support the detainee's position.

A higher authority (the CSRT Director) automatically reviews the result of every CSRT. He has the power to return the record to the tribunal for further proceedings if appropriate. *See* CSRT Order ¶ h; Implementation Memorandum Encl. (1)fflfI (8). The CSRT Director is a two-star admiral--a senior military officer. CSRTs are transparent proceedings. Members of the media, the International Committee of the Red Cross (ICRC), and non-governmental organizations may observe military commissions and the

unclassified portions of the CSRT proceedings. They also have access to the unclassified materials filed in Federal court. Every detainee now held at Guantanamo Bay has had a CSRT hearing. New detainees will have the same rights.

As of March 29, 2005, the CSRT Director had taken final action in all 558 cases. Thirty-eight detainees were determined no longer to be enemy combatants; 23 of them have been subsequently released to their home countries, and at the time of this Report's submission, arrangements are underway for the release of the others. (At <http://www.defenselink.mil/releases/2005/nr20050419-2661.html> (visited April 25, 2005)).

4. Administrative Review Boards

The United States provided the following information in its UN CHR 1503 response dated January 2005.

Administrative Review Boards (ARB). In an action unprecedented under the law of war, on May 11, 2004, the Department of Defense established special administrative review procedures to provide an annual individualized review of the detention of each enemy combatant at Guantanamo. The May 11, 2004 order was effective immediately. See www.DoD.mil/releases/2004/nr20040518-0806.html (May 18, 2004 announcing the May 11, order.) See www.defenselink.mil/news/May2004/d20040518gtmoreview.pdf (May 18, 2004). The Administrative Review Board (ARB) process permits the enemy combatant to explain personally why he or she is no longer a threat to the United States and its allies in the ongoing armed conflict against al-Qaida and its affiliates or supporters, or to explain why release would otherwise be appropriate. Such procedures are not required by the law of war, but the Department of Defense has elected to implement them in order to address some unique and unprecedented characteristics of the current conflict.

As noted above, the grant of an annual individualized process to determine whether to release or transfer a detainee is, as far as we are aware, unprecedented in the history of warfare. Similarly, the release of enemy combatants prior to the end of a war is a significant departure from past

wartime practices. Enemy combatants are detained for a very practical reason: to prevent them from returning to the fight.

The potential for enemy combatants to return to the fight is why the law of war permits their detention until the end of an armed conflict. Although military operations against al-Qaida and its affiliates in Afghanistan and globally are ongoing, the Department of Defense has decided as a matter of policy to institute these review procedures, which will assist DOD in fulfilling its commitment to help ensure that no one is detained any longer than is necessary for the security of the United States or its allies. See www.defenselink.mil/releases/2004/nr20040303-0403.html (March 3, 2004).

(1503 p. 24-29)

The United States reported as follows in the Annex to its CAT Report, pages 8-10 (updated as appropriate).

a. Administrative Review Boards

D. Assessing Detainees for Release/Transfer

1. Guantanamo Bay

The detention of each Guantanamo detainee is reviewed annually by an Administrative Review Board (ARB), established by an order on May 11, 2004 (*Review Procedure Announced for Guantanamo Detainees*, Department of Defense Press Release, May 18, 2004) (at <http://www.defenselink.mil/releases/2004/nr20040518-0806.html> (visited February 28, 2005)) and supplemented by an implementing directive on September 14, 2004. *See Implementation of Administrative Review Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba* (at <http://www.defenselink.mil/news/Sep2004/d20040914adminreview.pdf> (visited February 28, 2005)).

The ARB assesses whether an enemy combatant continues to pose a threat to the United States or its allies, or whether there are other factors bearing on the need for continued detention. The process permits the detainee to appear in person before an ARB panel of three military officers

to explain why the detainee is no longer a threat to the United States or its allies, and to provide information to support the detainee's release.

Each enemy combatant is provided with an unclassified written summary of the primary factors favoring the detainee's continued detention and the primary factors favoring the detainee's release or transfer from Guantanamo. The enemy combatant is also provided with a military officer to provide assistance throughout the ARB process. In addition, the review board will accept written information from the government of nationality, and from the detainee's relatives through that government, as well as from counsel representing detainees in habeas corpus proceedings. Based on all of this information, as well as submissions by U.S. Government agencies, the ARB makes a written assessment by majority vote on whether there is reason to believe that the enemy combatant no longer poses a threat to the United States or its allies in the ongoing armed conflict and any other factors bearing on the need for continued detention. The Board also makes a written recommendation on whether detention should be continued. The recommendations of the board are reviewed by a judge advocate for legal sufficiency and then go to the Designated Civilian Official (currently Secretary of the Navy Gordon England), who decides whether to release, transfer or continue to detain the individual.

As of [September 26, 2005,] the Department of Defense (DoD) has announced its intent to conduct Administrative Review Board reviews for [460] detainees; it has informed the detainees' respective host countries and asked them to notify the detainees' relatives; and it has invited them to provide information for the hearings. (At <www.defenselink.mil/news/combatant_Tribunals.html> (visited [October 13, 2005])). The first Annual Administrative Review Board began on December 14, 2004, and [250] Administrative Review Boards have been conducted as of [September 26, 2005].

The United States has no interest in detaining enemy combatants any longer than necessary. On an ongoing basis, even prior to the Annual Administrative Review Boards, the U.S. Government has reviewed the continued detention of each enemy combatant. The United States releases detainees when it believes they no longer continue to pose a threat to the United States and its allies. Furthermore, the United States has transferred some detainees to the custody of their home governments when those governments 1) are prepared to take the steps necessary to ensure that the

person will not pose a continuing threat to the United States or its allies; and/or 2) are prepared to investigate or prosecute the person, as appropriate. The United States may also transfer a detainee to a country other than the country of the detainee's nationality, when the country requests transfer for purposes of criminal prosecution.

As of [September 26, 2005], the United States has transferred [264] persons from Guantanamo — [178] transferred for release and [68] transferred to the custody of other governments for further detention, investigation, prosecution, or control. Of the [68] detainees who were transferred to the control of other governments, 29 were transferred to Pakistan, seven to Russia, five to Morocco, nine to the United Kingdom, six to France, four to Saudi Arabia, two to Belgium, one to Kuwait, [two] to Spain, one to Australia, [one to Denmark] and one to Sweden.

In some situations, it has been difficult to find locations to which to transfer safely detainees from Guantanamo when they do not want to return to their country of nationality or when they have expressed reasonable fears if returned. Until the United States can find a suitable location for the safe release of a detainee, the detainee remains in U.S. control.

It is often difficult to assess whether an individual released from Guantanamo will return to combat and pose a threat to the United States or its allies. Determining whether an individual truly poses a threat is made more difficult by information that is often ambiguous or conflicting, as well as by denial and deception efforts on the part of the individual detainees. Based on information seized at al-Qaida camps in Afghanistan and elsewhere, the United States is aware that Taliban and al-Qaida fighters are trained in counter-interrogation techniques and instructed to claim, for example, that they are cooks, religious students, or teachers. It has proven challenging to ascertain the true facts and has required a great deal of time to investigate fully the background of each detainee. There is a concerted, professional effort to assess information from the field, from interrogations, and from other detainees. In spite of rigorous U.S. review procedures, some detainees who were released from Guantanamo have returned to fighting in Afghanistan against U.S. and allied forces. Based on a variety of reports, as many as 12 individuals have returned to terrorism upon return to their country of citizenship.

Some examples of detainees who have returned to the fight include:

- A former Guantanamo detainee who reportedly killed an Afghan judge leaving a mosque in Afghanistan;

- A former Guantanamo detainee (released by the United States in January 2004) who was recaptured in May 2004 when he shot at U.S. forces and was found to be carrying a letter of introduction from the Taliban; and

- Two detainees (released from Guantanamo in May 2003 and April 2004, respectively) who were killed in the summer of 2004 while engaged in combat operations in Afghanistan.

The fact that some detainees upon their release are returning to combat underscores the ongoing nature of the armed conflict with al-Qaida and the practical reality that in defending itself against al-Qaida, the United States must proceed very carefully in its determination of whether a detainee no longer poses a threat to the United States and its allies.

(DoD annex to CAT report, pp. 10-12)

5. Military Commissions

The United States reported the following in the Annex to the CAT Report, page 14, which has been updated as of October 2005 (updated discussion in brackets).

Military Commissions to Try Detainees Held at Guantanamo Bay

In 2001, the President authorized military commissions to try those detainees charged with war crimes. See Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, November 13, 2001 (at **http://www.whitehouse.gov/news/releases/2001/11/print/20011113-27.html** (visited February 28, 2005)). The Geneva Conventions recognize military fora as legitimate and appropriate to try those persons who engage in belligerent acts in contravention of the law of war. The United States has used military commissions throughout its history. During the Civil War, Union Commanders conducted more than 2,000 military commissions. Following the Civil War, the United States used military commissions to try eight conspirators (all U.S. citizens and civilians) in President Lincoln's

assassination. During World War II, President Roosevelt used military commissions to prosecute eight Nazi saboteurs for spying (including at least one U.S. citizen). A military commission tried Japanese General Yamashita for war crimes committed while defending the Philippine Islands. In addition to the international war crimes tribunals, the Allied Powers, such as England, France, and the United States, tried hundreds of lesser-known persons by military commissions in Germany and the Pacific theater after World War II.

[To date, the President has designated 17 detainees as eligible for trial by military commission. Of those, the United States has since transferred three detainees to their country of nationality, where they have been released. Four Guantanamo detainees have been charged and have had preliminary hearings before a military commission. Pending the outcome of the appeal in *Hamdan v. Rumsfeld*,the Appointing Authority issued a directive on December 10, 2004, holding in abeyance these four cases. On September 20, 2005, the Appointing Authority revoked this Directive as to the case of *United States* v. *David Mathew Hicks.* On September 23, 2005, the Presiding Officer scheduled the initial session in this case for November 18, 2005.

In Federal litigation concerning military commissions, the D.C. Circuit Court of Appeals recently acknowledged the President's authority to convene military commissions and held that military commissions are a proper and legally appropriate venue to try enemy combatants. *Hamdan* v. *Rumsfeld*,No. 04-5393 (D.C. Cir. July 15, 2005). The petitioner in that case, Salim Ahmed Hamdan, has appealed this decision to the U.S. Supreme Court. The Supreme Court has not decided whether it will consider the appeal.

On August 31, 2005, the Secretary of Defense approved several changes to the rules governing military commissions. These changes follow a careful review of commission procedures and take into account a number of factors, including issues that arose in connection with military commission proceedings that began in late 2004.

The principal effect of these changes is to make the presiding officer function more like a judge and the other panel members function more like a jury. Previously, the presiding officer and other panel members together determined findings and sentences, as well as resolved most legal questions.

The new procedures remove the presiding officer from voting on findings and sentencing and give the other panel members sole responsibility for these determinations, while allocating responsibility for ruling on most questions of law to the presiding officer.

The new changes also clarify the provisions governing the presence of the accused at trial and access by the accused to classified information. The new provisions make clear that the accused shall be present except when necessary to protect classified information and where the presiding officer has concluded that admission of such information in the absence of the accused would not prejudice a fair trial. These changes also make clear that the presiding officer must exclude information from trial if the accused would be denied a full and fair trial from lack of access to the information. If the accused is denied access to classified information admitted at trial, his military defense counsel will continue to have access to the information. Other changes approved include lengthening the amount of time for the Military Commissions Review Panel to review the trial record of each case.]

4. Transfers/Non-Refoulement (Questions numbered 44, 45)

Q44. Please provide information on repatriated prisoners. Which safeguards have been put in place to guarantee that they are not subjected to torture or cruel and degrading treatment upon their return? Which monitoring mechanisms are there to ensure that these persons are not subjected to torture of inhuman or degrading treatment upon their return? Which monitoring mechanisms are there to ensure that these persons are not subject to torture or inhuman or degrading treatment?

Q45. Please provide information about the extraordinary rendition programme.

The United States stated in its UN CHR 1503 response dated January 2005 as follows, at pages 36-37.

Non-refoulement. In its actions involving the possible repatriation of Guantanamo detainees to other countries, the United States takes seriously the principle of *non-refoulement*. It is U.S. policy not to "expel, return

(‘*refouler*’) or extradite" individuals to other countries where the United States believes it is “more likely than not” that they will be tortured.

In the context of the removal of aliens subject to U.S. immigration procedures in the United States, the President rejected a legislative proposal in September-October 2004 that would have had the effect of permitting the return of certain dangerous aliens even if they were more likely than not to be tortured. The text of a letter from the Counsel to the President Alberto R. Gonzales to the Washington Post, printed in the Washington Post on October 5, 2004, page A24, reads as follows:

> "A September 30 front-page article inaccurately reported that the Bush administration supports a provision in the House intelligence reform bill that would permit the deportation of certain foreign nationals to countries where they are likely to be tortured.
>
> The president did not propose and does not support this provision.
>
> He has made clear that the United States stands against and will not tolerate torture and that the United States remains committed to complying with its obligations under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Consistent with that treaty, the United States does not expel, return or extradite individuals to countries where the United States believes it is likely that they will be tortured."
>
> The provision in question was deleted from the final text of the intelligence reorganization bill.

The United States reported as follows in the Annex to the CAT Report, page 13.

Transfers or Releases to Third Countries

After it is determined that a detainee no longer continues to pose a threat to the U.S. security interests or that a detainee no longer meets the criteria of enemy combatant and is eligible for release or transfer, the United States generally seeks to return the detainee to his or her country of nationality. The Department of Defense has transferred detainees to the control of their governments of nationality when those governments are prepared to take the steps necessary to ensure that the detainees will not pose

a continuing threat to the United States and only after the United States receives assurances that the government concerned will treat the detainee humanely and in a manner consistent with its international obligations. A detainee may be considered for transfer to a country other than his country of nationality, such as in circumstances where that country requests transfer of the detainee for purposes of criminal prosecution. Of particular concern to the United States is whether the foreign government concerned will treat the detainee humanely, in a manner consistent with its international obligations, and will not persecute the individual because of his race, religion, nationality, membership in a social group, or political opinion. In some cases, however, transfers cannot easily be arranged.

U.S. policy is not to transfer a person to a country if it is determined that it is more likely than not that the person will be tortured or, in appropriate cases, that the person has a well-founded fear of persecution and would not be disqualified from persecution protection on criminal- or security-related grounds. If a case were to arise in which the assurances obtained from the receiving government are not sufficient when balanced against treatment concerns, the United States would not transfer a detainee to the control of that government unless the concerns were satisfactorily resolved. Circumstances have arisen in the past where the Department of Defense elected not to transfer detainees to their country of origin because of torture concerns.

With respect to the application of these policies to detainees at Guantanamo Bay, the U.S. Government in February of 2005 filed factual declarations with a Federal court for use in domestic litigation. These declarations describe in greater detail the application of the policy described above as it applies to the detainees at Guantanamo Bay.